

FCC MAIL SECTION

Federal Communications Commission

JUN 12 9 06 AM '95

Before the
Federal Communications Commission
Washington, D.C. 20554

DISTRICT OF COLUMBIA

MM Docket No. 93-229

In the Matter of

Amendment of Section 73.202(b).	RM-8296
Table of Allotments,	RM-8463
FM Broadcast Stations.	
(Midway, Panacea and	
Quincy, Florida) ¹	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 2, 1995;

Released: June 9, 1995

By the Chief, Allocations Branch:

1. At the request of EME Communications ("EME"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 5257 (1993), proposing the allotment of Channel 263A to Panacea, Florida, as that community's first local aural transmission service. EME filed comments and reply comments. Bitner-James Partnership ("BJP") permittee of Station WTPS(FM), Channel 264A, Quincy, Florida, filed a counterproposal proposing the allotment of alternate Channel 237A to Panacea, Florida; the substitution of Channel 264C3 for Channel 264A at Quincy, Florida, and the reallocation of Channel 264C3 from Quincy, Florida, to Midway, Florida, and the modification of Station WTPS(FM)'s construction permit to specify Midway, Florida, as its community of license.² Catamount Communications, Inc. ("Catamount"), licensee of Station WHKX, Channel 260C2, Lafayette, Florida, filed comments in response to the counterproposal.³

2. EME filed comments supporting the allotment of Channel 263A. However, it filed reply comments withdrawing its support for Channel 263A or Channel 237A to Panacea, Florida. EME states that it fully supports the counterproposal filed by BJP. Since, EME no longer has a bona fide interest in an allotment at Panacea, but rather supports BJP's proposal, we will not allot Channels 237A nor 263A to Panacea, Florida. Absent, a bona fide expression of interest, we will not allot a channel. See *Lopez and Dushore, Pennsylvania*, 7 FCC Rcd 854 (1992). Therefore, all comments filed in response to EME's proposal are now moot and will not be discussed.

3. BJP in its counterproposal seeks the substitution of Channel 264C3 for Channel 264A at Quincy, Florida, and the reallocation of Channel 264C3 from Quincy to Mid-

way, Florida. It contends that Channel 264C3 cannot be allotted to Quincy, Florida, and serve 100% of the community of license, due to the site restriction needed to avoid short spacing to Station WJAO(FM), Marianna, Florida. Furthermore, BJP states that the site restriction will enable Station WTPS(FM) to serve Midway, Florida, and provide a first local service to the community. BJP also notes that Midway is listed in the 1990 U.S. Census with a population of 852 persons. Midway is located in Gadsden County, which has a population of 41,105 persons. Midway is an incorporated community with a mayor, city hall, police department, volunteer fire department, post office, Planning and Zoning Commission, recreation department, schools, churches and a business district. Whereas Quincy, population 7,444 (1990 U.S. Census), also located in Gadsden County will continue to be served by full-time Stations WWSD(AM) and WFHT(FM). Therefore, Quincy will retain local service.

4. BJP seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules, which permit the modification of a station's authorization to specify a new community of license citing *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989) *recons. granted in part*, 5 FCC Rcd 7094 (1990). BJP states that the allotment of Channel 264C3 to Midway will result in a preferential arrangement of allotments. BJP claims that the reallocation of Channel 264C3 from Quincy, Florida, (population 7,444)⁴ to Midway, Florida, (population 852) will permit the expansion of service by Station WTPS to provide service to an additional 147,792 persons, whereas the current Class A station provides service to only 98,551 persons. BJP contends that it proposes to relocate to Midway because it cannot upgrade and provide city grade coverage to Quincy. BJP argues that this proposal is consistent with the Commission's decision in *Zanesville and South Zanesville, Ohio*, 5 FCC Rcd 6726 (1990). In that case, Station WCVZ(FM), Zanesville proposed to upgrade at South Zanesville because it could not provide a city grade signal to Zanesville due to the site restriction imposed on the higher class channel. BJP states that the public would benefit from a large increase in coverage area as well as the provision of a first local service. These benefits could not be achieved if Station WTPS were to remain at Quincy. Midway nor Quincy is located within any urbanized area. BJP argues that WTPS(FM) is an un-built station and is eligible for a change in community of license since its construction permit was obtained through a settlement agreement, before the Administrative Law Judge's ("ALJ") Initial Decision was issued. WTPS remains un-built due to (1) the bankruptcy of the majority partner, Monte R. Bitner ("Bitner"); (2) the pending assignment of license to a new entity (BAPH-930702GK); and (3) the loss of its authorized transmitter site, which belonged to the bankrupt majority partner. A new transmitter site for the Class A channel has been negotiated and an application is to be filed by the new entity shortly.⁵

5. In its comments Catamount states that the Commission should deny or dismiss BJP's counterproposal for several reasons. Catamount argues that the construction

¹ The communities of Midway and Quincy, Florida, have been added to the caption.

² Public Notice of the counterproposal was given on April 20, 1994, Report No. 2006.

³ Counsel to BJP filed a "Notice of Change of Address" which is

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⁴ Population figures are taken from the 1990 U.S. Census.

⁵ BJP filed an application for a 6 kilowatt station on October 10, 1993 (BPH-931027IB).

permit for Station WTPS expired September 29, 1993, two days after BJP filed its counterproposal. On that date BJP filed its second application to extend the permit (BMPH-930929JG). Catamount contends that the second application for extension, which remains pending failed to comply with 47 C.F.R. Section 73.3534(a), which requires the filing of such applications at least 30 days prior to the expiration date when the facts supporting the extension request are known in time to permit such filing. Catamount states that BJP made no showing in its extension application why it waited until the expiration date to file for an extension. Catamount argues that absent a valid and existing construction permit, the Commission cannot consider BJP's counterproposal to upgrade the Quincy channel or change its community of license, citing *Santa Margarita and Guadalupe, California*, 2 FCC Rcd 6930 (1987). Catamount states that a review of BJP extension application, as well as a pending application for assignment of the WTPS permit and related filings reveal that significant questions exist regarding BJP's qualifications and whether the Commission will reinstate or extend the WTPS permit. Catamount notes that Bitner has objected to the assignment of WTPS's permit to the James in a letter received at the Commission on August 13, 1993, and he also objected to the grant of the first extension of WTPS's permit. On March 29, 1994, the Commission directed BJP to provide additional information with respect to the pending extension and assignment applications within 30 days. Catamount claims that BJP filed for bankruptcy on April 8, 1992, and a trustee was appointed shortly thereafter. BJP never reported its bankruptcy until its first application to extend WTPS's construction permit was filed December 7, 1991 (BMPH-921207JD) executed by Leah James. Noting Bitner's bankruptcy, and Mrs. James' efforts to acquire Bitner's interest in the partnership through negotiations with the Bankruptcy Trustee, BJP did not report that the trustee had actually taken control of Bitner's majority interest. BJP did not report or seek approval of the trustee's acquisition of Bitner's interest until it filed a Form 316 application on June 25, 1993, more than 14 months after Bitner filed for bankruptcy, and more than seven weeks after the Commission's May 4, 1993, letter directing BJP to file such an application immediately if a transfer of control had occurred (BTCH-930625GR).⁶ Catamount further states that on May 11, 1993, before the trustee's involvement was reported, the trustee sold Bitner's 51% interest to the James. BJP did not file an application for prior Commission consent to this transaction until almost two months after the James acquired the controlling interest in BJP (BAPH-930702GK). This is the assignment application now pending, along with the pending extension of time application, which are the subject of the Commission's March 29, 1994, inquiry. Catamount contends that there is misrepresentation or lack

of candor by BJP and the James.⁷ We find that the issues raised by Catamount are now moot, since all the applications have been resolved in BJP's favor.

6. Based on the above information, we believe that the substitution of Channel 264C3 for Channel 264A at Quincy, Florida, the reallocation of Channel 264C3 from Quincy to Midway, Florida, and the modification of Station WTPS(FM)'s construction permit to specify Midway as its community of license is in the public interest. However, in examining a change of community of license proposal, we must determine whether the proposal would result in a preferential arrangement of allotments pursuant to the Commission's change of community procedures. *See Modification of FM and TV Authorizations to Specify a New Community of License*, ("Change of Community R&O"), 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990) ("Change of Community MO&O"). In determining whether a proposed reallocation represents a preferential arrangement of allotments, we compare the existing arrangement of allotments with the proposed arrangement of allotments using our FM allotment priorities.⁸ In making this determination, we find that Midway (population 852) would receive its first local aural transmission service, which is priority three, and Quincy (population 7,444) will continue to be served by full-time Stations WWSD(AM) and WFHT(FM), falls under priority four, other public interest matters. In addition, an engineering analysis shows that the reallocation of Channel 264C3 to Midway will enable Station WTPS(FM) to serve an additional 148,368 persons within an area of 2,606 square kilometers (1,007 square miles), while the removal of Station WTPS from Quincy will create a reception service loss to 701 persons within an area of 39 square kilometers (15 square miles). The analysis also shows that both the loss area and gain area for Quincy will continue receive at least five full-time reception services, therefore we consider this to be adequate service. Quincy will also continue to receive a city grade signal, 70 dBu contour, from Station WTPS(FM). We also find that the change in community will not cause any disruption to existing service since Station WTPS has never been on the air. Finally, neither community is located within or near any Urbanized Area.

TECHNICAL SUMMARY

7. Channel 264C3 can be allotted to Midway in compliance with the Commission's minimum distance separation requirements at petitioner's specified transmitter site.⁹ In accordance with Section 1.420(i) of the Commission's Rules, we will modify the construction permit for Station WTPS(FM) to specify Channel 264C3, Midway, Florida as its community of license.

⁶ The application for transfer of control was granted July 23, 1993.

⁷ On March 29, 1993, BJP's first application for extension of time (BMPH-921207JD) was granted by the Commission. On July 2, 1993, BJP filed an application to assign its construction permit to Leah and John James (BAPH-930702GK). Leah James was an original 49% general partner along with Monte R. Bitner, who was a 51% general partner. On April 6, 1995, the Commission granted the application for assignment, and they also granted the second application (BMPH-930929JG) for extension of time.

In addition BJP's modification application (BMPH-931027IB) for a construction permit was also granted on April 6, 1995.

⁸ The allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. [Co-equal weight given to priorities (2) and (3)]. *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

⁹ The coordinates for Channel 264C3 at Midway are North Latitude 30-32-22 and West Longitude 84-21-54.

8. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 24, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Midway, Florida	264C3
Quincy, Florida	268C2

9. IT IS FURTHER ORDERED. That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit for Station WTPS(FM), Channel 264A, Quincy, Florida, IS MODIFIED, to specify operation on Channel 264C3, Midway, Florida, in lieu of Channel 264A, Quincy, Florida, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

10. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Bitner James Partnership, permittee of Station WTPS(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the upgrade and change of community.

11. Accordingly, IT IS FURTHER ORDERED. That the petition for rule making submitted by Clyde Scott, Jr. D/B/A EME Communications, requesting the allotment of Channel 263A to Panacea, Florida (RM- 8296), IS DISMISSED.

12. IT IS FURTHER ORDERED. That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau